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No. 94-151

In The

Supreme Court of the United States

October Term, 1994

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

PAGE BOOKS, INC., d/b/a BACHELOR'S LIBRARY ADULT BOOKSTORE,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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PAGE BOOKS, INC., d/b/a BACHELOR'S LIBRARY ADULT BOOKSTORE,[1]

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Page Books, Inc., d/b/a Bachelor's Library Adult Bookstore, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Appellate Court of Illinois, Second Judicial District's opinion in this case. That opinion is reported at 235 Ill.App.3d 765, 601 N.E.2d 273, 175 Ill.Dec. 876.

STATEMENT OF FACTS

This case was commenced by a criminal complaint, charging the Respondent with two (2) Counts of

[1] There are no parent companies, subsidiaries, or affiliates of the corporation.

Obscenity, which was filed on December 8, 1989. Count I alleged that the Respondent committed the offense of Obscenity in that "he provided for viewing certain videotapes, the titles of which are contained in Exhibit A which is attached and incorporated herein by reference." Count II alleged that the Respondent committed the offense of Obscenity in that he "offered for sale obscene magazines, the titles of which are contained in Exhibit B which is attached and incorporated herein by reference." Exhibits A and B listed the titles for five (5) videotapes and twenty-five (25) magazines respectively. (C. 2, 71, 89)

After all evidence was presented, the Petitioner tendered general verdict forms for each count which were given over Respondent's objection. Respondent requested and tendered verdict forms with special interrogatories. The interrogatories would have required the jury to give individual consideration to each allegedly obscene magazine and videotape. The jury would indicate their decision by checking either obscene or not obscene next to each title. (C. 934-935) The trial court refused Respondent's request.

In closing argument, the Petitioner insisted that it only had to prove that one magazine or one videotape was obscene. Petitioner argued:

> . . . Let me make the comment that if you find any one of the three videos that you viewed to be obscene along with the other elements that we have to prove, you should sign a guilty verdict. If you shall find any one of the 25 magazines you viewed along with the other elements we have to prove, you should sign a guilty verdict.

> It's not the State's burden to prove each and every magazine, all 25, that they are obscene and meet the other elements beyond a reasonable doubt, but any one of them. C. 946-947

On January 11, 1991, the jury returned a general verdict of guilty as to each count. The Respondent's post-trial motion for a new trial was denied, and a judgment was entered as to both counts. The Respondent was then ordered to pay a fine of $1,000.00 and costs of $306.00 on each count, for a combined total of $2,612.00. Notice of Appeal was timely filed. (C. 157-158)

The Appellate Court reversed, holding that a general verdict form which does not specify which material forms the basis for the jury's verdict effectively constitutes an invalid prior restraint. *People v. Page Books*, 235 Ill.App.3d 765, 772, 601 N.E.2d 273, 277, 175 Ill.Dec. 876, 880 (2nd Dist. 1992). In reversing the conviction, the Appellate Court emphasized that its opinion was "significantly based upon considerations uniquely applicable to the protection of the freedom of expression". *Id.* It also expressed concern for cases wherein the sufficiency of evidence is challenged on appeal. *Id.*

The Petitioner sought review of the Appellate Court decision. The Illinois Supreme Court granted the Petitioner's Leave to Appeal. The Supreme Court dismissed the appeal on April 13, 1994. That decision is reported at ___ Ill.2d ___, 631 N.E.2d 233, 197 Ill.Dec. 230 (1994). The Petitioner filed its Petition For Writ Of Certiorari with the United States Supreme Court on July 12, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

In its Petition for Writ of Certiorari, the Petitioner argues that the opinion of the Illinois Second District Appellate Court should be reviewed by this Court because it "seriously misinterprets" the First Amendment. (Petition For Writ Of Certiorari, p. 5, hereinafter referred to as "Petition, p. 5") The Petitioner's claim is without merit. The practice in obscenity cases of the use of general verdict forms for determining the obscenity *vel non* of multiple communicative items is an unconstitutional prior restraint in violation of the First Amendment. *People v. Page Books, Inc.* 235 Ill.App.3d 765, 601 N.E.2d 273, 175 Ill.Dec. 876 (2nd Dist. 1992). In addition, the holding by the Appellate Court does not question the reliability of this Court's holding in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, (1973), which defined what is obscene, nor does it represent a clear conflict in authority between sister states that calls for this Court's intervention. (Petition, pp. 5, 8)

1. The opinion of the Illinois Second District Appellate Court is not in clear conflict with an opinion in a sister state

There is no clear conflict of law between Illinois and Oregon as claimed by the Petitioner. While the Oregon Supreme Court in *State v. McNamara*, 274 Or. 565, 547 P.2d 598 (1976), did rule that general verdict forms used in a state obscenity prosecution were acceptable, it did so for a different reason than that relied upon by the Illinois Second District Appellate Court. In fact, despite its ruling, the Oregon Supreme Court announced its support of

the practice of individual determinations on the obscenity *vel non* of each item charged by the State. *McNamara* at 569, at 600. Therefore, there is no clear conflict of substance that requires clarification.

In *McNamara*, a general verdict of guilty had been returned in the trial court which involved the dissemination of one of four allegedly obscene magazines named in the Indictment. No provision was made for determining which of the four formed the basis of the verdict. The Oregon Supreme Court *acknowledged the chilling effect* which this type of verdict would have on freedom of expression because a defendant would have to stop selling all of his magazines or run the risk of prosecution in the absence of knowing which magazine formed the basis of the jury's verdict. *McNamara* at 569, at 600 (emphasis added). The *McNamara* Court suggested dealing with that issue by charging each communicative item in separate counts.

> Where First Amendment interests are involved defendant should be entitled to demand such a separation of the charges. It could be said, of course, that where the defendant does not move for a severance of the charges, the public might be harmed as a result of the withdrawal of non-obscene books from the market.
>
> *McNamara*, at 569, at 600.

The *McNamara* court ultimately concluded that such a procedure was a matter for legislative action and not a constitutional basis for overturning the convictions. *Id.* The Illinois Second District Appellate Court took *McNamara* one step further and fully recognized the First Amendment implications of the acknowledged chilling

effect and reversed the obscenity conviction in the case at bar.

Admittedly, the ruling of the Oregon Supreme Court reversed the Oregon Court of Appeals in *McNamara*. However, as stated, the Supreme Court did so for a reason much different than that advanced in the argument of the Respondent and subsequently adopted by the Illinois Second District Appellate Court.

In *McNamara*, the Oregon Supreme Court took exception with the Court of Appeal's reasoning that special verdict forms in obscenity cases were necessary for the benefit of the reviewing court. *McNamara* at 568, at 599 The Court of Appeals held that it needed to know the obscenity *vel non* of all of the items considered by a jury in order to properly review an obscenity conviction. *State v. McNamara*, 23 Or. App. 475, 481, 543 P.2d 14, 17, 18 (1975). The Supreme Court disagreed, distinguishing this Court's opinions in *Street v. New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354, (1969) and *Eaton v. City of Tulsa*, 415 U.S. 697, 39 L.Ed.2d 693, 94 S.Ct. 1228 (1974).

In *Page Books*, the argument was that the use of general verdict forms acted as a prior restraint against the dissemination of constitutionally protected communicative items. The Illinois Second District Appellate Court agreed that the Respondent and others were entitled to know the obscenity *vel non* of each of the charged magazines and videos in order to prevent an outcome which would "publicly taint constitutionally protected materials which were not the actual object of the jury's finding." *Page Books* at 772, at 277, at 880. The primary question was not whether the *reviewing court* needed to know, as it

was in *McNamara*, but that the *Respondent*, as well as other disseminators of presumptively protected materials, needed to know.[2]

Respondent contends that if the issue of a prior restraint had been put to the Supreme Court of Oregon in *McNamara*, the use of a general verdict form would not have been allowed to stand.

2. The Illinois Second District Appellate Court has correctly interpreted the First Amendment and has not "baselessly broadened" the scope of definition of a prior restraint as claimed by the Petitioner.

The use of a general verdict form in obscenity cases involving multiple communicative items deprives defendants from learning the obscenity *vel non* of each of the items. However, the Petitioner states that this practice has no constitutional ramifications and, specifically, does not constitute a prior restraint. (Petition, pp. 6-7) The Petitioner's position is incorrect.

Under the First Amendment, the Respondent and other disseminators of presumptively protected communicative items are entitled to a clear judicial determination of the obscenity *vel non* of those items which have been made the subject of a State action. *Freedman v. Maryland*, 380 U.S. 51, 58, 13 L.Ed.2d 649, 654, 85 S.Ct. 734, 739

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[2] In addition, the Illinois Second District Appellate Court agreed with the Oregon Court of Appeals that general verdict forms in obscenity cases are a cause for concern wherein the sufficiency of evidence is challenged on appeal. *Page Books* at 772, at 277, at 880.

(1965). Without this determination, the State engages in an unconstitutional prior restraint. *Id., Page Books* at 772, at 277, at 880.

The use of a general verdict form involving multiple communicative items is not the requisite clear "judicial determination." As stated by the Illinois Second District Appellate Court as well as by the Oregon Court of Appeals and the Oregon Supreme Court, general verdict forms leave obscenity defendants only to guess at which of the charged items were found to be obscene and which were not. *Page Books* at 772, at 277, at 880. *State v. McNamara*, 23 Or. App. 475, 478, 543 P.2d 14, 16 (1975); *State v. McNamara*, 274 Or. 565, 569, 547 P.2d 598, 600 (1976). As a result, booksellers must decide whether to continue to disseminate the items considered by the jury and leave themselves open to future prosecution, or to engage in "self-censorship" and remove those items from the marketplace.

The use of a general verdict form in cases such as the one at bar fails to adequately inform an individual as to what is protected and what is unprotected expression, i.e. what he can and cannot do. Because the jury could have found that some of the communicative items in question were not obscene, a prior restraint of this nature is "more onerous" because there would be an increase of the likelihood of removing protected materials from the marketplace of ideas, as well as the risk of criminal prosecution. See *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 315-16, 63 L.Ed.2d 413, 420, 100 S.Ct. 1156, 1161-62 (1980). A result such as this runs contrary to our system of justice which "prefers to punish the few who abuse rights of speech *after* they break the law than to

throttle them and all others beforehand." See note 13, *Vance*, 445 U.S. at 316, 63 L.Ed.2d at 420, 100 S.Ct. at 1161 (emphasis included).

If such a presumption of obscenity were to attach to a magazine such as *National Geographic* because of its inclusion in a list of multiple communicative items in a single count or a finding of guilty of obscenity based on a general jury verdict, few would fail to agree that such a result would be absurd. However, the line between constitutionally protected expression and obscenity is seldom bright, and often dim and uncertain. *Bantam Books v. Sullivan*, 372 U.S. 58, 66, 9 L.Ed.2d 584, 590, 83 S.Ct. 631, 637 (1963). The inclusion of multiple communicative items in a single count that charges the offense of obscenity and the use of a general jury verdict is not the "sensitive tool" necessary to separate protected from unprotected speech. *Speiser v. Randall*, 357 U.S. 513, 525, 2 L.Ed.2d 1460, 1472, 78 S.Ct. 1332, 1342 (1958). They are nothing more than a cumbersome net that ensnares all expressions, protected as well as unprotected, in their path.

Carried to its logical conclusion, the accepted use of general verdict forms in obscenity cases encourages the State to charge every item at a bookstore, video store or other place of distribution of communicative materials. The State can then effectively curb the dissemination of thousands of communicative items through a finding of obscenity with regard to only one of a defendant's videos or magazines. All of the defendant's items would be characterized as obscene, even though there was no clear

judicial determination to that effect, and they would suffer a detriment to their future communication. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975).

The Petitioner cites *People v. Sequoia Books, Inc.*, 160 Ill.App.3d 315, 513 N.E.2d 468, 112 Ill.Dec. 54 (2nd Dist 1987), to support its argument that closely connected acts may be joined in one count. (Petition, p. 6) In that case, multiple magazines were combined in a single count charging obscenity and general verdicts were submitted. However, the verdict forms also contained special interrogatories requiring the jury to indicate the obscenity *vel non* of each magazine. A fair reading of *Sequoia* indicates that the special interrogatories saved this otherwise defective procedure because they "required the juries to make a separate determination as to each magazine." *Sequoia*, at 324, at 475, at 61.

Also relied upon by the Petitioner is *People v. McMullen*, 400 Ill. 253, 79 N.E.2d 470 (1948). *McMullen* is procedurally distinguishable in that it concerns lesser included offenses being combined with a more serious offense in a single count. In *McMullen*, each count of a six-count indictment, in varying language, charged that the defendants had, "Burglariously broke and entered a building . . . with intent to steal . . . " *McMullen*, at 254, at 470. The first two counts charged burglary and theft of two guns while in the building. The third and fourth counts charged the theft of one of the guns, and the fifth and sixth counts charged the theft of the other gun. The present case does not involve any issue regarding lesser

included offenses. Rather, the concern is multiple accusations of the identical offense based upon the dissemination of different communicative materials. Additionally, *McMullen* did not involve First Amendment concerns which present special issues, and deals with materials which are presumptively protected. *People v. Eagle Books*, 151 Ill.2d 235, 602 N.E.2d 798, 176 Ill.Dec. 852 (1992).

The Petitioner correctly points out that the use of general verdict forms will impinge on a defendant's actions "in the future" as to what communicative items he or she may offer for dissemination (Petition, p. 6) But the Petitioner incorrectly argues that the future does not matter. *Id.* at 6, 7. The future does matter with regard to presumptively protected communicative materials. When a defendant is restrained from the dissemination of these materials absent a clear judicial determination of their obscenity *vel non*, a prior restraint exists and the First Amendment has been violated. *Freedman* at 58, at 654, at 739.

The Petitioner's argument that special interrogatories only give notice of the obscenity *vel non* as to such books as the State "happens to select" as the basis of its prosecution is nonsensical. (Petition, p. 7) The prohibition against prior restraints applies to presumptively protected communicative materials which have become the target of State action. In the case at bar, the State "happened to select" 25 magazines and three videos as the basis of its prosecution. As such, the State is bound not to engage in a prior restraint of these materials.

The Petitioner also resorts to a distortion of the opinion of the Illinois Second District Appellate Court in

order to argue the legal sufficiency of the use of general verdict forms involving multiple communicative items. The Petitioner claims that the Appellate Court states, in effect, that the use of general verdict forms deprives Respondent only of the "educational value" of the verdict. (Petition, p. 6) In reality, the Appellate Court opinion recognizes that there is much more than an "educational value" at stake. Rather, the Appellate Court states that its concern with the use of general verdict forms involving multiple communicative items is the protection of the freedom of expression under the First Amendment. *Page Books* at 772, at 277, at 880.

3. The opinion of the Illinois Second District Appellate Court does not undermine the authority of *Miller v. California*.

The Petitioner's third argument is that *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), is undermined by the opinion of the Illinois Second District Appellate Court. (Petition, p. 5) The Petitioner argues that the Illinois Obscenity Statute, 720 ILCS 5/11-20, which incorporates the three-part *Miller* test, is the proper source of notice as to what does or does not constitute a criminal offense. (Petition, p. 5) However, by its own language, the Statute incorporates contemporary adult community standards as a key factor in the determination of obscenity. 720 ILCS 5/11-20. Because the jury is the arbiter of these standards, the jury gives notice of what contemporary adult community standards are to a defendant on trial.

In fact, two of the three prongs of *Miller* and of the statutory definition require determinations according to contemporary adult community standards. These standards are not necessarily static, but are ever-changing. Therefore, it is ludicrous to claim that the Statute alone could ever adequately give notice of the types of materials which are proscribed by the Illinois Obscenity Statute. The Statute does not say what contemporary adult community standards are. It merely requires applying them in the determination of obscenity. Since all communicative materials are presumptively protected by the First Amendment and only lose that protection by a valid judicial determination that they are obscene, *Freedman* at 58, at 654, at 739, it is logical to incorporate jury verdicts in determining where the dim and uncertain line separating obscene and non-obscene materials is being drawn by contemporary adult community standards. *Bantam Books*, at 66, at 590, at 637. In fact, jury verdicts may well be the only truly definitive manner of determining the obscenity or non-obscenity of any particular item according to community standards.

Contrary to the Petitioner's argument, the opinion of the Illinois Second District Appellate Court does not conflict with this Court's holding in *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973). First, *Heller* does not deal with verdict forms, general or otherwise. Second, under the Petitioner's logic, if the State brought obscenity charges against a defendant for the dissemination of just one allegedly obscene communicative item and that defendant was convicted through the use of a general verdict form, then the use of that general verdict form would constitute a prior adversary hearing. The

general verdict form would act as an adversary determination "made in advance of any state action to which the information obtained by the [general verdict] would be relevant". (Petition, p. 9)

Through arguments such as the *Heller* conflict claim, the Petitioner seeks to tarnish and dismiss the well-reasoned opinion of the Illinois Second District Appellate Court. The Appellate Court correctly ruled that the use of general verdict forms in obscenity cases involving the dissemination of multiple communicative items represents an unconstitutional prior restraint. The Petitioner states that there is nothing constitutionally deficient with the use of the general verdict forms in cases such as the one at bar. However, this practice is hardly the type of First Amendment notice and guidance required by *Freedman*, *Miller*, and their progeny.

CONCLUSION

For the foregoing reasons, Respondent requests that a Writ of Certiorari be denied, so that the decision of the Illinois Appellate Court, Second Judicial District may stand.

Respectfully submitted,

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